No. 89-1109

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PATRICIA MASON,

Petitioner,

v.

CITY OF GASTONIA, et al.

Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN W. GRESHAM*
C. MARGARET ERRINGTON
Ferguson, Stein, Watt,
Wallas, Adkins &
Gresham, P.A.
Suite 730
700 E. Stonewall Street
Charlotte, N.C. 28202

Counsel for Petitioner

*Counsel of Record

16pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-1109

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PATRICIA MASON,

Petitioner,

v.

CITY OF GASTONIA, et al.

Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE CONFLICT REGARDING THE APPROPRIATE STANDARD OF APPELLATE REVIEW OF CONSTITUTIONAL CLAIMS

The parties to this proceeding, although differing on other issues,

are in clear agreement regarding the basis of the Fourth Circuit's decision. As Respondents candidly state in their Brief in Opposition, the appellate court - in the teeth of contrary findings by both the jury and trial judge - made its own de novo determination of the disputed facts:

> Petitioner contends that the holding by the Fourth Circuit . . . . amounts to a de novo review of the case. What Petitioner fails to recognize is that this Court has always held de novo appellate review is proper when a constitutional deprivation is at issue . . . .. In the instant matter, the Fourth Circuit reviewed whether petitioner's constitutional due process rights had been violated.

Brief in Opposition, pp. 15-17.

Having acknowledged the de novo review by the court of appeals, the Respondents then assert that the Seventh Amendment and Rule 52 simply

do not apply to the factual findings of a jury or trial judge if the facts so found demonstrate a violation of the Constitution.

The Respondents' contention that the Fourth Circuit's practice of making a de novo determination of disputed facts in constitutional cases is a correct interpretation of constitutional law, is unsupported by the cases from this court cited by the Respondent.[1] More importantly, it is contrary to the rulings in at

---

1 Two of the cases, City of Houston v. Hill, 482 U.S. 451 (1987) and Miller v. California 413 U.S. 15 (1973) simply recognize that factual determinations adverse to First Amendment claims require careful appellate scrutiny. The only other decision of this court cited by Respondents, Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) was decided solely on the basis that the plaintiffs' claim of entitlement to gas service did not implicate a constitutionally protected property interest. This court undertook no de novo factfinding.

least six circuits (the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits) which have expressly scrutinized jury verdicts in constitutional cases under the same narrow, deferential standard of review utilized in all other Seventh Amendment cases. A brief summary of the law in each of these circuits is set out below.

The Fifth Circuit emphasized in Baltezore v. Concordia Parish, 767 F.2d 202 (5th. Cir. 1985), that a motion for judgment n.o.v. challenging a jury finding of a denial of due-process was to be assessed under

> the familiar standard for reviewing motions for judgment notwithstanding the verdict. The Court should consider all the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion. If there is substantial evidence

> opposed to the motion of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied.

767 F.2d at 205-06. See, also, Barnett v. Housing Authority, 707 F.2d 1571, 1577 (5th. Cir. 1983) (applying "reasonable and fair-minded jury standard in upholding due process verdict). The Respondents' suggestion to the contrary, Hatton v. Wicks, 744 F.2d 501 (5th Cir. 1984), does not suggest a contrary position within the Fifth Circuit. In Hatton a school teacher claimed that her discharge for refusing to take a student into her class violated her substantive due process claim. The trial court granted summary judgment for the school system and the Fifth Circuit concluded that on the

"admitted facts" plaintiff's rights had not been violated.

The Sixth Circuit has applied the same narrow standard of review to a similar case in which a jury had found that the plaintiff had been unconstitutionally dismissed.

> The record in this case when the motion for judgment notwithstanding the verdict is considered, must be reviewed in the light most favorable to the party against whom the motion is made while giving that party the advantage of any reasonable inference the evidence can justify.

Stachura v. Truszkowski, 763 F.2d 211, 213 (6th. Cir. 1985).

The Seventh Circuit likewise applies a limited standard or review to jury verdicts on constitutional claims, regardless of which party prevailed at trial. In Crawford v. Edmonson, 764 F.2d 479 (7th. Cir. 1985), the court upheld a jury-

verdict finding no constitutional violation explaining:

> Our standard for reviewing the trial court's denial of [the] motion for a directed verdict is whether, viewing all of the evidence in the light most favorable to the defendants, there was sufficient evidence to warrant submitting to the jury the question.

764 F.2d at 487. (Fourteenth Amendment claim). See, also, Vandenplas v. City of Muskego, 753 F.2d 555, 560-61, (7th. Cir. 1985)(upholding jury verdict for defendant on Fourteenth Amendment claim). The Seventh Circuit, abjuring any claim to de novo review has utilized the identical deferential approach in sustaining jury findings of constitutional violations. See, Hibma v. Odegaard, 769 F.2d 1147, 1153 (7th. Cir. 1985); Knapp v. Whitaker, 757 F.2d 827, 843 (7th. Cir. 1985). Madision County

Jail Inmates v. Thompson, 773 F.2d 834, 838 (7th. Cir. 1985)(First, Fourth, Eighth and Fourteenth Amendment claim).

In Okeson v. Tolley School Dist., 760 F.2d 864 (8th Cir. 1985), the jury sustained the due process claims of a dismissed public employee. In upholding that verdict, the Eighth Circuit disavowed any authority to make its own assessment of the facts. The verdict could only be overturned

> if reasonable minds viewing the evidence could not differ as to [which party] should prevail. The court must examine the evidence in the light most favorable to sustaining the verdict of the jury and must give the prevailing party the benefit of all reasonable inferences which may be drawn from the evidence.

760 F.2d at 868.

The Eighth Circuit decision cited by the Respondents, McConnell

v. Anderson, 451 F.2d 193 (8th Cir. 1971) involved the circuit's reversal of the grant of a preliminary injunction. The decision does not sanction de novo fact finding by the Eighth Circuit.

Additionally the Ninth Circuit has specifically rejected the argument that it could make de novo factual findings in reviewing a jury verdict on a constitutional claim. In Robins v. Harum, 773 F.2d 1004, 1006 (9th Cir. 1985) the court stated:

> A judgment notwithstanding a jury verdict is appropriate when the evidence permits only one reasonable conclusion as to the verdict [citation omitted]. Neither the district court nor this court may weigh the evidence or order a result it finds more reasonable if substantial evidence supports the jury verdict.

773 F.2d at 1006 (Fourteenth Amendment claim).

The decision cited by the Respondents, Doran v. Houle, 721 F.2d 1182 (9th Cir. 1983) is inapposite for it is decided solely on the issue of whether the plaintiffs had a property interest in a government permit procedure.

In the Tenth Circuit, because an "appellate court will not retry facts, the jury's evaluation of conflicting evidence is conclusively binding on appeal." Rock v. McCoy, 763 F.2d 394, 396 (10th Cir. 1985)(Fourth, Sixth, Eighth and Fourteenth Amendment claim). See also, Lavickly v. Burnett, 758 F.2d 468, 476 (10th Cir. 1985)(Fourteenth Amendment claim).

Respondents acknowledge and endorse the Fourth Circuit's practice of making de novo factual findings in constitutional cases, which is squarely contrary to the decisions of

a majority of the circuits. The practice is also flatly inconsistent with the terms of the Seventh Amendment, which makes no exception, express or implied, for jury verdicts in constitutional cases. Several of the decisions of this court relied on by Respondents suggest that the court may be particularly vigilant in reviewing lower court decisions rejecting a First Amendment claim, but they afford no authority for overturning the factual findings of a jury sustaining a constitutional claim.

The Fourth Circuit in adopting a standard of de novo review of jury verdicts in cases involving constitutional claims has radically departed from the traditional standards of appellate review applied in other circuits and has rendered meaningless the limitations on

appellate review embodied in the Seventh Amendment and Rule 52. Thus, the nature of the conflict between the circuits urgently calls for this court to resolve the divergent decisions by the courts of appeal.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Fourth Circuit. In the alternative, it may be appropriate to defer action on this petition until Lytle v. Household Manufacturing Inc., No. 88-334 is decided.

Respectfully submitted,

JOHN W. GRESHAM
MARGARET ERRINGTON
Ferguson, Stein, Watt,
Wallas Adkins &
Gresham, P.A.
700 South Stonewall St.
Suite 730
Charlotte, NC 28202
704-375-8461